IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1142

HOWARD G. REAMER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Howard G. Reamer respectfully moves this Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on December 22, 1978.

OPINION BELOW

The opinion of the Court of Appeals upon petitioner's appeal from conviction is not yet published and is attached as Appendix A.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on December 22, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Did the Court of Appeals err in concluding that the trial court had not abused its discretion nor abridged Petitioner's right of confrontation in restricting cross-examination of a key prosecution witness where that cross-examination was designed to show not merely the fact of bias, but further, the extent to which that bias infected the witness' testimony?

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

United States Constitution — Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of Evidence — Rule 611

> (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation

> effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
>
> (c) Leading question. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

STATEMENT OF THE CASE

On February 25, 1976, Howard G. Reamer, a Baltimore, Maryland attorney was indicted on twenty-one counts of mail fraud under 18 U.S.C. 1341. The charges grew out of an investigation of inflated and false claims for personal injuries arising from automobile accidents and submitted for insurance payments.

The initial trial began on April 26, 1976, and ended in a mistrial on May 20, 1976, when the jury was unable to reach a decision. A second trial began on September 13, 1976. On October 17, 1976, the jury found Petitioner guilty on ten counts while acquitting him of the remaining eleven. On January 28, 1977, Petitioner received a five year sentence on each count, to run concurrently. His conviction was affirmed in the United States Court of Appeals for the Fourth Circuit on December 22, 1978.

The essence of the alleged scheme to defraud was that Petitioner, in representing automobile accident victims

against the insurers of the persons purportedly liable for the accidents, submitted false and fraudulent medical reports and bills to the insurance company in an effort to obtain larger settlements. The indictment also alleged that Petitioner, in furtherance of this scheme, employed "runners" to procure clients and that these "runners" induced clients to represent that the clients had incurred injuries which in fact had not been sustained.

At trial, the Government presented testimony of representatives of various insurance companies alleged to have been defrauded. These witnesses testified that Petitioner had provided them with claimants' medical bills and reports and that the claims were settled in reliance on those bills and reports.

Also presented by the Government was the testimony of two runners and several clients. The first runner testified that he had solicited clients whom he believed to be genuinely injured. The other stated that although he gratuitously coached some colicited clients, Petitioner was unaware of his "coaching" activities and had instructed him to refer only cases in which there were bonda fide injuries. The clients who testified stated that either they were not sure or could not remember the number of times they had visited the treating physician; several did state, however, that they had not received the number of treatments reflected by the bills.

The only real evidence of Petitioner's intent to defraud which the Government sought to produce was offered by three physicians, each of whom had been previously convicted and each of whom had agreed to cooperate with the Government. The first physician, Dr. Stuart Perkal, testified that he had back dated reports for Petitioner. In two cases, Petitioner himself had been the claimant, and in those cases Dr. Perkal testified

that the bills were inflated. However, with regard to all of the other reports represented by the indictments, he was unable to say that they were in fact false.

Also testifying was Dr. Frank Washington. However, his testimony was that he had no agreement with Petitioner to inflate bills and backdate reports, and any inflated bill that he had prepared could well have been done without Appellant's knowledge.

The crux of the Government's case came down to the testimony of Dr. Melvin Sobkov whc testified that, although his reports were accurate with respect to the clients' injuries, he had backdated and inflated bills at Petitioner's request. He testified that virtually all the bills he forwarded to Appellant were inflated. On cross-examination, Petitioner introduced a list of clients Petitioner had referred to Dr. Sobkov. This list, prepared by Dr. Sobkov, purported to show the number of actual doctor visits for each client. Dr. Sobkov testified that he had prepared the list for federal investigators using a complex formula of his own making and based on information within the client/patient file. He further stated that while the number on the list represented a conservative estimate, it was accurate within four or five visits.

Petitioner sought to impeach Dr. Sobkov by asking that he re-create his calculations using only his file. The trial court ruled, however, that while the witness could be questioned with respect to his calculations, Petitioner would have to supply the witness with both the file and the list. Petitioner objected to the trial court's ruling, arguing that this procedure effectively foreclosed the credibility attack because Dr. Sobkov was permitted to explain his calculations while referring to his "answer sheet." Petitioner argued then, and later on appeal,[1] that although the fact of Sobkov's conviction and the nature and extent of his agreement with the

[1] Although Petitioner fully briefed this issue for the Court of Appeals, that court's opinion totally disregards and fails to address the argument. See, *infra.* at 1a-4a.

Government were brought to the jury's attention,[2] the trial court's mandated procedure for cross-examination concerning the list prevented demonstrating to the jury the full extent to which Dr. Sobkov's testimony was colored by his own desire to assist the Government. Petitioner argued that the purpose of the exercise was to show that the witness could not re-create the list with any accuracy and that his attempt to implicate Petitioner was solely to protect and gain favor for himself.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION REGARDING THE BREADTH AND SCOPE OF THIS COURT'S DECISIONS IN ALFORD v. UNITED STATES AND DAVIS v. ALASKA IN CROSS-EXAMINING A BIASED WITNESS.

In a series of cases beginning with *Alford v. United States,* 282 U.S. 687 (1931) and culminating in *Davis v. Alaska,* 415 U.S. 308 (1974), this Court has unequivocably held that prohibiting an accused from showing that a central Government witness is biased or prejudiced constitutes a denial of the Sixth Amendment right of confrontation. As Chief Justice Burger stated in *Davis v. Alaska:*

> . . . while counsel was permitted to ask Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial . . . 415 U.S. at 318 (Emphasis in original)

[2] Dr. Sobkov's agreement with the Government embraced two areas. First, although Dr. Sobkov had previously been convicted of mail fraud, his sentence had been reduced in return for his agreement to cooperate. Second, the Government had written a letter on his behalf to the State Licensing Board advising the Board of his cooperation, and it was clear that Sobkov viewed his cooperation with the prosecution as essential to regaining his right to practice medicine.

The instant case presents for this Court's review the logical extension of the *Alford-Davis* holdings. It is not contended that Petitioner was unable to demonstrate whether Dr. Sobkov was biased or prejudiced; the jury was informed of the arrangement between Dr. Sobkov and the Government. Petitioner was, however, foreclosed from showing, in a direct and concrete manner, *how* that bias impacted upon and infected the witness' testimony.

This Court has not heretofore decided just how far the *Alford-Davis* principle sweeps in demonstrating a witness' bias. To show that a particular witness is biased, is, of course, a significant point bearing on the witness' credibility. That preliminary showing, however, is dramatically enhanced where the defense can demonstrate to the jury a specific example of the operation of that bias. It is this further evidence which Petitioner believes is logically embraced by the *Alford-Davis* principle and which was prohibited in the instant case. Petitioner was denied the opportunity to graphically present the full extent to which Dr. Sobkov would implicate Petitioner in Dr. Sobkov's effort to curry favor for himself, and as a result, a principal prosecution witness was insulated from a proper and legitimate credibility attack. Petitioner urges that the trial court's ruling constituted an undue restriction of the right of cross-examination and an abridgement of the right of confrontation. Since the decision of the Court of Appeals represents an undercutting of *Alford* and *Davis* and is unsupportable in light of those cases, this Court should grant the writ.

II.

THE INSTANT CASE PRESENTS THE OPPORTUNITY FOR THE COURT, IN THE EXERCISE OF ITS SUPERVISORY POWERS, TO DELINEATE THE STANDARD UNDER FEDERAL RULE OF EVIDENCE 611(b) THAT FEDERAL COURTS SHOULD APPLY IN A CRIMINAL CASE.

Federal Rule of Evidence 611(b), reprinted in full *supra* at 2-3, provides that the trial court has discretion in limiting the cross-examination of witnesses, and the various courts of appeals have determined that the extent of cross-examination is a matter which normally rests within the sound discretion of the court. See, e.g., *United States v. Gloria,* 494 F.2d 477 (5th Cir.), *cert. denied* 419 U.S. 995 (1974); *United States v. Daniels,* 528 F.2d 705 (6th Cir. 1976); *Egger v. United States,* 509 F.2d 745 (9th Cir.) *cert. denied* 423 U.S. 842 (1976); and *United States v. Green,* 523 F.2d 229 (2nd Cir.) *cert. denied* 423 U.S. 1074 (1976).

Notwithstanding the relegation of this issue to the trial court's discretion, several courts have noted that in a criminal case, cross-examination of a witness relative to his credibility is to be given the broadest possible scope. *United States v. Crumley,* 565 F.2d 945 (5th Cir. 1978); *United States v. Williams,* 478 F.2d 369 (4th Cir. 1973); and *United States v. Smolar,* 557 F.2d 13 (1st Cir. 1977). This principle is particularly applicable where the witness' testimony is essential or important to the case. See, *Gordon v. United States,* 344 U.S. 414, 422 (1953). Underlying this principle is the recognition that, while every limitation of cross-examination does not raise Sixth Amendment issues, the right of confrontation does hover behind and is potentially abridged when that discretion is exercised.

Given the interplay between Rule 611(b), the Sixth Amendment, and the wide latitude vested in the trial judge, Petitioner suggests that this Court should grant certiorari in order to clarify the standards which trial

courts should apply under Rule 611(b). Because of the conflicting intersts represented by confrontation clause principles on the one hand, and needless use of a trial court's time on the other, Petitioner submits that review by this Court would provide much needed guidance on a sensitive issue. Furthermore, review by this Court would serve to resolve what necessarily must be a widely disparate application of Rule 611(b) in the various district courts.

The instant case is an appropriate one for this Court to undertake such a review because Petitioner's attempt to impeach Dr. Sobkov was of critical importance to the defense case. Indeed, Dr. Sobkov was the primary witness by which the Government sought to prove Petitioner's criminal intent. Evening assuming that the trial court's limitation of cross-examination did not offend the right of confrontation, it did nonetheless severly restrict the defense from adducing facts from which the jury could reasonably discount Dr. Sobkov's testimony. Consequently, the instant case highlights the pitfalls in the application of Rule 611(b) and presents an opportunity to correct them.

CONCLUSION

For the above-stated reasons, the Petitioner prays this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Baltimore, Md. 21201,
Counsel for Petitioner.

APPENDIX

OPINION

United States Court of Appeals
for the Fourth Circuit

No. 77-1351

United States of America,
Appellee,

v.

Howard G. Reamer,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.

Argued: October 6, 1978 Decided: December 22, 1978

Before BRYAN, Senior Circuit Judge, WIDENER and HALL, Circuit Judges.

Michael E. Marr (Mark E. Mason, Sutley and Marr on brief) for Appellant; Joshua R. Treem, Assistant United States Attorney, Herbert Better, Assistant United States Attorney (Russell T. Baker, Jr., United States Attorney on brief) for Appellee.

HALL, Circuit Judge:

Howard G. Reamer, a practicing attorney in Baltimore, Maryland, was convicted on ten counts of mail fraud in violation of 18 U.S.C.A. § 1341, on charges that he operated a scheme to defraud insurance companies in the settlement of automobile accident claims. He objects primarily to the district court's instructions to the jury that if it found from the evidence that defendant (i) had attempted to suppress evidence or (ii) had knowingly violated the Maryland barratry statute[1] or the professional code of ethics incident to the submission of false medical reports, then it could consider such findings as probative of defendant's criminal intent. We affirm.

This scheme was considered in *United States v. Perkal,* 530 F.2d 604 (4th Cir.) *cert. denied,* 97 S. Ct. 70 (1976), and involved three parties: (1) a "runner" who contacts injured parties and refers them to the doctor or the lawyer;[2] (2) the doctor who sees the claimants and prepares reports of their alleged injuries and bills for medical services;[3] and (3) the lawyer who, representing the claimants, submits to the insurance carrier the exaggerated medical bills and reports and makes settlement on the basis of such inflated bills and reports, dividing the proceeds among the claimants and the parties to the scheme.

During the investigation, postal inspectors obtained sworn statements from certain of defendant's clients to prove the falsity of the medical bills and reports specified in the indictment. Subsequently, but before trial, some of these persons were personally interviewed by the defendant. When called upon to testify each client who had been so interviewed by the defendant

[1] Md. Code Ann. art. 27 § 13 (1976 Repl. Vol.)

[2] The defendant paid one runner the sum of $14,920 for the referral of about 100 cases over a five month period.

[3] The record indicates that several doctors participated. Dr. Perkal, who testified for the government in this case was convicted for his participation. *Perkal, supra.*

disavowed the statements given to the postal inspectors.

Because of this pattern — Reamer's pre-trial interviews with witnesses and each one's subsequent failure of memory at trial — the government requested and the court gave an instruction on the suppression of evidence, as a matter for the jury to consider on the issue of criminal intent.

We think there was ample evidence to support the court's instruction, and it was properly given. The law is well established that, in a criminal case, evidence of a defendant's attempt to influence a witness to testify regardless of the truth is admissible against him on the issue of criminal intent. *See Wilson v. United States,* 162 U.S. 613, 620-21 (1896); *United States v. Jamar,* 561 F.2d 1103, 1106-07 (4th Cir. 1977). Therefore, we think the court properly instructed that, if the jury found that the defendant attempted to suppress evidence, it could consider such evidence against him on the issue of consciousness of guilt. *See Allen v. United States,* 164 U.S. 492, 498-500 (1896); 1 Devitt and Blackmar, *Federal Jury Practice and Instructions,* 3rd Ed. § 15.09.

Also, on the issue of criminal intent, the court instructed that state law and the code of professional conduct prohibit the solicitation of clients by attorneys, and the standards for violation of the professional code were read to the jury. The court concluded its charge with the admonition that defendant was not on trial for any conduct not alleged in the indictment. We think this latter instruction was supported by the evidence and was properly given. *U.S. v. Keane,* 522 F.2d 534, 553-57 (7th Cir. 1975), *cert. denied,* 424 U.S. 976 (1976); *United States v. Mandel,* 415 F. Supp. 997, 1008-10 (D.C. Md. 1976).

Defendant also raises as an issue in his appeal the district court's refusal to allow his proffer of similar act evidence, which he contended would support his defense of good faith by contradicting the testimony of

participating doctors to the effect that, in their dealings with defendant, he knew their bills were inflated. The proffer consisted of a number of Dr. Perkal's files which had not been backdated to show consultations occurring soon after the claimants' injury. Dr. Perkal was only one of three doctors who testified against defendant. Dr. Perkal testified that he falsified his files by noting fictitious injuries and treatments, and his files were, in fact, rarely backdated. We think the limited purpose of the proffer and the extrinsic proof required for it made its admission or exclusion entirely a matter of discretion for the court.

Finding no error in the various issues raised on appeal, the judgment of conviction is

Affirmed.

No. 78-1142

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OCTOBER TERM, 1978

HOWARD G. REAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 6-9) that the district court improperly limited cross-examination of a prosecution witness.

1. Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on ten counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent five-year terms of imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-4a).

The evidence at trial showed that petitioner, a lawyer, used "runner[s]" to obtain clients who had been in automobile accidents (Pet. App. 2a). Petitioner generally sent these clients to a chiropractor, Dr. Sobkov, or one of two doctors, Dr. Perkal or Dr. Washington.[1] Sobkov

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[1]Each of the three had previously been convicted of participating in insurance fraud schemes similar to petitioner's.

testified that he had periodic conversations with petitioner in which petitioner requested that he backdate and inflate bills and in which petitioner stressed the necessity of keeping the bills in line with the liability and property damage (Tr. 1460-1467). All three admitted sending inflated bills to petitioner and they stated that petitioner would "cut" the bills, retaining a portion of the proceeds for himself (Tr. 1250, 1459-1460). Insurance companies, relying on the falsified medical bills and reports mailed by petitioner, made excessive settlements (Pet. App. 2a).

2. Petitioner contends (Pet. 6-9) that the district court improperly limited defense cross-examination of Sobkov.

After agreeing to cooperate with the government, Sobkov compiled a list of patients who had been referred to him by petitioner, which indicated the approximate number of visits Sobkov had fraudulently claimed for each patient (Tr. 1604, 1691). Using this list, postal inspectors interviewed petitioner's clients and obtained sworn statements confirming that petitioner had submitted false medical bills and reports (Pet. App. 2a). As a result of these interviews, some of the clients also testified at trial (Pet. App. 2a-3a). The government treated the list as an investigatory tool only, and did not introduce the list or rely on it at trial.

Petitioner, however, did introduce the list and attempted to cross-examine Sobkov about it, over the government's objection that the list was merely an investigatory tool (Tr. 1613, 1621). Petitioner initially told the court that he wanted to give Sobkov the list and then, after also giving him a file from which an item on the list was prepared, to question him about the item (Tr. 1622). The court agreed to this procedure. After questioning Sobkov generally about his preparation of the list, however, petitioner changed this position and objected to providing Sobkov with a copy of the list during questioning. Instead, petitioner sought to have Sobkov

recreate the list on the witness stand using only the raw files (Tr. 1631-1632). The court rejected this procedure.

The court properly ruled that Sobkov should be allowed to refer to the list, as originally agreed. The accuracy of the list was at best a collateral matter, since the government did not claim that the list was reliable. Indeed, the district court would have been entirely justified in refusing to permit any cross-examination of Sobkov concerning the accuracy of the list. But since the court permitted the defense to attack Sobkov's credibility in this manner, Sobkov was entitled to see what he was defending. It would have been unfair to require him to reconstruct from raw data, and under pressure of cross-examination, figures that he initially took two days to prepare. Any difficulty he might have experienced might have been unjustifiably construed by the jury as reflecting on his veracity, even if it was entirely attributable to the conditions under which Sobkov would be required to attempt the reconstruction. The court therefore acted entirely within its discretion in limiting cross-examination to avoid such misleading results. Fed. R. Evid. 611(a)(1), (2), (3).

Further, since petitioner was in effect proposing a time-consuming experiment that at most might have demonstrated only that Sobkov could not reproduce his calculations under pressure, and that might have taken many hours of court time, the court was justified in denying petitioner's request in the interest of the expeditious and orderly conduct of the trial. Fed. R. Evid. 403. See also *United States* v. *Carrion*, 463 F. 2d 704, 707 (9th Cir. 1972).[2]

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[2]Unlike *Davis* v. *Alaska*, 415 U.S. 308 (1974), and *Alford* v. *United States*, 282 U.S. 687 (1931), upon which petitioner relies (Pet. 6-7), the line of questioning that petitioner attempted to pursue here could not conceivably have done "[s]erious damage to the strength of the [government's] case" (415 U.S. at 319). The accuracy of the list was

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

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merely a collateral issue, and petitioner was not precluded from presenting any significant facts about Sobkov to the jury. Rather, he was simply prevented from undertaking an experiment that might or might not have reflected on Sobkov's credibility.

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